

Robinson v City of New York

2023 NY Slip Op 32049(U)

June 15, 2023

Supreme Court, New York County

Docket Number: Index No. 190078/2018

Judge: Adam Silvera

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ADAM SILVERA

PART

13

Justice

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ROBERTA B ROBINSON, ROBERTA ROBINSON,

Plaintiff,

INDEX NO. 190078/2018

MOTION DATE 04/25/2023

MOTION SEQ. NO. 007

- v -

CITY OF NEW YORK (THE), CRANE CO., DAP, INC., FLOWSERVE US, INC. SOLELY AS SUCCESSOR TO ROCKWELL MANUFACTURING COMPANY, EDWARD VALVES, INC., NORDSTROM VALVES, INC. AND EDWARD VOGT VALVE COMPANY, FMC CORPORATION, INDIVIDUALLY AND AS SUCCESSOR TO NORTHERN PEERLESS PUMP COMPANY, COFFIN AND PEERLESS PUMP COMPANY, FOSTER WHEELER, LLC, GIAMBOI AND SONS, INC., GIAMBOI BROS., INC., GIAMBOI PLASTERING CORP., GOULDS PUMPS, INC., I.T.T. INDUSTRIES, INC., INDIVIDUALLY AND AS SUCCESSOR TO BELL & GOSSETT, J. & J. GIAMBOI PLASTERING, INC., MARIO & DIBONO PLASTERING CO. INC., METROPOLITAN LIFE INSURANCE CO., NOVINGERS, INC., PEERLESS INDUSTRIES, INC., TISHMAN CONSTRUCTION CORPORATION, TISHMAN LIQUIDATING CORPORATION, TISHMAN REALTY & CONSTRUCTION CO., INC., TURNER CONSTRUCTION COMPANY, UNION CARBIDE CORPORATION, WEIL MCLAIN, A DIVISION OF MARLEY-WYLAIN COMPANY, AIRCO., INC., CHEMLINE, INC., INDIVIDUALLY AND AS SUCCESSOR TO STEELCOTE MANUFACTURING COMPANY, HILTON WORLDWIDE, INC., F/K/A HILTON HOTELS CORPORATION, INDIVIDUALLY AND AS SUCCESSOR TO HILTON HOTEL CORPORATION, HONEYWELL INTERNATIONAL INC. INDIVIDUALLY AND F/K/A ALLIEDSIGNAL, INC., AND AS SUCCESSOR-IN-INTEREST TO THE BENDIX CORP., NATIONAL KINNEY CORP., INDIVIDUALLY AND AS SUCCESSOR TO URIS, PARKS HOTEL & RESORTS, INC., INDIVIDUALLY AND AS SUCCESSOR TO HILTON WORLDWIDE, INC., AND HILTON HOTELS CORPORATION, ROCKEFELLER GROUP INTERNATIONAL, INC.,

Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 007) 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, it is ordered that the instant motion for summary judgment seeking dismissal of this action, pursuant to CPLR §3212, is denied for the reasons set forth below.

Here, defendant Tishman Liquidating Corporation (hereinafter referred to as defendant “Tishman Liquidating”) moves for summary judgment to dismiss this action against it on the grounds that it was not the general contractor at any of the buildings identified by plaintiff, and, thus, not liable for any injury plaintiff allegedly sustained from such sites. Defendant Tishman Liquidating contends that plaintiff did not identify defendant Tishman Liquidating in its answer to interrogatories. Plaintiff passed away a few weeks following the commencement of the instant action. Defendant Tishman Liquidating argues that during the deposition of fact witness, Mr. Roddy Davis. Mr. Davis was an employee of the business owned by plaintiff and his family. Defendant Tishman Liquidating contends that according to Mr. Davis’ deposition testimony, plaintiff visited the job sites for purposes of payroll and on occasion to deliver supplies. Plaintiff’s visits to the job sites would last 15 minutes to half a day. Moving defendant further argues that Mr. Davis testified generally that “Tishman” was the general contractor at sites where Keystone Wire & Iron Works performed iron work, and could not recall specific buildings in which Tishman was the general contractor or any specific years. Defendant Tishman Liquidating contends that, as 80%-90% of Keystone’s business was conducted outside of New York State, plaintiff’s alleged exposure to asbestos at sites in New York State would have been a small percentage. Moving defendant argues that Mr. Davis testified that it was possible for plaintiff to have been exposed to asbestos from the clean up of debris at the worksites. Specifically, Mr.

Davis testified that plaintiff visited 60 Broad Street, possibly 60 Broadway which Mr. Davis may have meant 60 Broad Street, and the Yuris building.

As to 60 Broad Street, moving defendant proffers a New York Times article which reported that the building was being constructed by the Uris Building Corporation. As to the 60 Broadway, defendant Tishman Liquidating argues that Mr. Davis could have mistakenly identified 60 Broadway as such testimony followed his testimony regarding 60 Broad Street. In support, moving defendant proffers another New York Times article to show that the building was purchased by North American Company and argues that such address no longer exists. Regarding the Yuris building, defendant states that no such building ever existed in New York. However, the Uris building, located at 1633 Broadway, was built by Uris Buildings Corporation, according to a New York Times article. Defendant Tishman Liquidating further argues that it was not the general contractor at any other building, outside of New York State, which Mr. Davis identified.

In opposition, plaintiff alleges that defendant Tishman Liquidating failed to establish that it is free from liability and could not have caused plaintiff's illness. Plaintiff further alleges that Mr. Davis identified defendant Tishman Liquidating as a general contractor at sites predominantly in New York City where plaintiff was exposed to asbestos from moving defendant's employees as well as from subcontractors. Defendant Tishman Liquidating replies.

The Court notes that summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law. *See Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case". *Winegrad v New York*

University Medical Center, 64 NY2d 851, 853 (1985). Despite the sufficiency of the opposing papers, the failure to make such a showing requires denial of the motion. *See id.* at 853. Additionally, summary judgment motions should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining. *See Zuckerman v City of New York*, 49 NY2d 557, 560 (1980). “In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility.” *Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 (1st Dep’t 1992), citing *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 (1st Dep’t 1990). The court’s role is “issue-finding, rather than issue-determination”. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957) (internal quotations omitted). As such, summary judgment is rarely granted in negligence actions unless there is no conflict at all in the evidence. *See Ugarriza v Schmieder*, 46 NY2d 471, 475-476 (1979). Furthermore, the Appellate Division, First Department has held that on a motion for summary judgment, it is moving defendant’s burden “to unequivocally establish that its product could not have contributed to the causation of plaintiff’s injury”. *Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 (1st Dep’t 1995).

Here, defendant Tishman Liquidating has failed to meet its initial burden in establishing that it is free from liability and that it could not have contributed to plaintiff’s injury. *See DiSalvo v AO Smith Water Products*, 123 AD3d 498, 499 (1st Dep’t 2014). Although defendant Tishman Liquidating argues that it has proffered sufficient evidence to support the instant motion, even without an affidavit from someone with personal knowledge, the Court notes that attorneys’ affirmations are unavailing. “[A] bare affirmation of . . . [an] attorney who demonstrated no personal knowledge . . . is without evidentiary value and thus unavailing.” *Zuckerman v City of New York*, 49 NY2d 557, 563 (1980). Furthermore, an affirmation by an attorney who is without

the requisite knowledge of the facts has no probative value. *See Di Falco, Field & Lomenzo v Newburgh Dyeing Corp.*, 81 AD2d 560, 561 (1 Dept 1981), *aff'd* 54 NY2d 715 (1981). Here, the attorney's affirmation fails to demonstrate that she has any personal knowledge, and does not conclusively establish that moving defendant is free from any liability. As defendant Tishman Liquidating failed to establish entitlement to summary judgment, the instant motion is denied.

Moreover, a review of Mr. Davis' deposition transcript reveals that he testified that moving defendant was a general contractor on sites where Keystone was the iron subcontractor over the course of plaintiff's 15-20 year career, and that he saw moving defendant's name on the jobsites. *See* Affirmation in Opposition to Defendant Tishman Liquidation [sic] Corporation's Motion for Summary Judgment, Exh. A., Depo. Tr. of Robert McCabe, dated October 17, 2019, p. 101, ln. 14-17 and p. 127, ln. 8-p. 128, ln. 2. The Appellate Division, First Department, has held that "[t]he deposition testimony of a litigant is sufficient to raise an issue of fact so as to preclude the grant of summary judgment dismissing the complaint. The assessment of the value of a witnesses' testimony constitutes an issue for resolution by the trier of fact, and any apparent discrepancy between the testimony and the evidence of record goes only to the weight and not the admissibility of the testimony." *Dollas v W.R. Grace and Co.*, 225 AD2d 319, 321 (1st Dep't 1996)(internal citations omitted). Thus, as defendant Tishman Liquidating has failed to meet its initial burden, and as triable issues of fact exist, the instant motion is denied.

Accordingly, it is

ORDERED that defendant Tishman Liquidating Corporation's motion for summary judgment seeking dismissal of the instant action is hereby denied in its entirety; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this Decision/Order upon all parties with notice of entry.

This constitutes the Decision/order of the Court.



6/15/2023

DATE

ADAM SILVERA, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: